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and thus the mere contract itself did not result in a status. As was said in *Svenson v. Svenson*, *supra*:

If, before children are begotten, before debts are created, real estate involved, and the community have long recognized the relation, the injured party seeks relief from fraud, error, or duress, it seems clear that no consideration of public policy will prevent a court from annulling a marriage, where the relation has not fully ripened into the complications of a public status.

In the case at bar cohabitation, if it resulted at all, was certainly of short duration and terminated immediately upon the discovery of the true facts in the case. For this reason it would seem to the court that no status, in the sense of a subsisting marriage, was established, but that, if anything, the relationship was little more than a simple contract, and for this reason voidable for material misrepresentations. It would seem to me a gross perversion of justice to refuse to release a party from a matrimonial contract whereby no important status affecting the relationship of the parties to the general public or to each other has been established, in the face of a situation which, as between the parties and the probable normal result of their continuing union, is attended with an element of such grave potential results.

ARKANSAS SUPREME COURT.

Sewage Disposal Plant—Operation Constituting a Nuisance—Injunction Against City Officers.

JONES et al. v. SEWER IMPROVEMENT DISTRICT NO. 3 OF THE CITY OF ROGERS et al.;
177 S. W. Rep., 888. (June 7, 1915.)

Neither municipal corporations nor local improvement districts in Arkansas can be sued at law for tort because they are agents of the State for governmental purposes; but in a proper case they may be enjoined from creating a nuisance or be required to abate one already created by them.

Under the laws of Arkansas it is the duty of the commissioners of a sewer district to so construct a sewage-disposal plant that it will not become a nuisance to any neighborhood or to any particular inhabitant thereof, and city officers will be enjoined from constructing or maintaining a sewage-disposal plant in such manner as to create a nuisance.

Plaintiffs' farms were near the city of Rogers, and the outlet of a septic tank for sewage disposal flowed through them. Plaintiffs had been paid for the damage to their land caused by the location and proper operation of the sewage-disposal plant, but additional damage was caused by improper construction or operation of the plant, which allowed fecal matter, other solid substances, and impure water to flow into the outlet. The court held that the plaintiffs were entitled to an injunction against the authorities in charge of the sewage-disposal plant to compel them to operate it in such manner as not to create a nuisance.

HART, J.: R. C. Jones and Martin Wheatley instituted separate actions in the chancery court against the city of Rogers, sewer improvement district No. 3 of the city of Rogers, and the individuals comprising the board of commissioners of said improvement district. The causes were consolidated for the purpose of trial.

Among other allegations contained in the complaint are the following: That the plaintiffs are farmers and reside on their farms near the city of Rogers, in Benton County, Ark. That a natural drain or water course runs through their land in which water flows the year round. That a sewer improvement district was organized in the city of Rogers and sewers constructed under it. That plaintiffs' farms were situated within a mile of the city limits, and that they resided thereon. And that a septic tank was constructed near their farms, and that the effluent from it flowed through the natural drain or water course on their land.

The allegations of the complaint state that the septic tank was maintained in such a manner as to constitute a nuisance, and the prayer of the plaintiffs is that the nuisance be abated and the defendants restrained from maintaining a septic tank in such a way as to constitute a nuisance.

The cause of action against the city of Rogers was dismissed by plaintiffs, and, upon a hearing of the cause, the chancellor dismissed the complaint for want of equity. The plaintiffs have appealed.

In the absence of a statute making them liable, we have held that an action will not lie against a municipal corporation or local improvement district or the officers thereof because such corporation and their officers are merely agents of the State for governmental purposes. For cases in point with reference to municipal corporations and their officers, see the following: *Browne v. Bentonville* (94 Ark., 80, 126 S. W., 93); *Franks v. Holly Grove* (93 Ark., 250, 124 S. W., 514, 137, Am. St. Rep., 86); *Gregg v. Hatcher* (94 Ark., 54, 125 S. W., 1007, 27 L. R. A. (N. S.), 138, 21, Ann. Cas., 982); *Gray v. Batesville* (74 Ark., 516, 86 S. W., 295); *Fort Smith v. Dodson* (51 Ark., 447, 11 S. W., 687, 4 L. R. A., 252, 14 Am. St. Rep., 62); *Fort Smith v. York* (52 Ark., 84, 12 S. W., 157); *Arkadelphia v. Windham* (49 Ark., 139, 4 S. W., 450, 4 Am. St. Rep., 32); *Trammell v. Russellville* (34 Ark., 105, 36 Am. Rep., 1). For cases in point as to improvement districts and their officers, see *Board of Improvement of Sewer District No. 2 v. Moreland* (94 Ark., 380, 127 S. W., 469, 21 Ann. Cas., 957); *Wood v. Drainage District No. 2 of Conway County* (110 Ark., 416, 161 S. W., 1057).

Article 2, section 22, of our constitution, provides that private property shall not be taken, appropriated, or damaged for public use without just compensation.

Under our statute sewer improvement districts may be formed in cities and outlets therefor secured outside the corporate limits of the city. See *Kraft v. Smothers* (103 Ark., 270; 146 S. W., 505).

As the constitution forbids the taking of private property for public use without just compensation, the grant of the legislature to cities and towns to form sewer-improvement districts and to obtain an outlet therefor outside the corporate limits of such municipality imposes upon such corporations the correlative duty to make just compensation for property so taken. In the exercise of this power we have held that the turning of sewage by a municipal corporation into a stream to the injury of lower riparian owners is within the constitutional provision requiring compensation for damaging property for public use, and that in such cases the damages should be assessed on the theory of a permanent taking under the right of eminent domain. *McLaughlin v. City of Hope* (107 Ark., 442; 155 S. W., 910; 47 L. R. A. (N. S.), 137). The same principle was recognized in *City of El Dorado et al. v. Scruggs* (168 S. W., 846), where the sewer improvement district commissioners constructed a sewer and appropriated the property of a landowner outside of the limits of the corporation for the purpose of discharging the effluent from the septic tank of the sewer district.

In the case at bar the plaintiffs instituted actions in the circuit court for the taking and damaging of their property by the sewer improvement district and recovered judgments therefor. As we have already seen, the flow from the septic tank emptied into a natural drain or watercourse which flowed through plaintiffs' land and which contained water throughout the year.

The measure of damages to a riparian owner from the use of a stream as an outlet for sewage is the difference in value of the land before and after the stream was so used. This rule was laid down in the case of *McLaughlin v. City of Hope*, supra, and *City of El Dorado v. Scruggs*, supra.

In the circuit court the plaintiffs were allowed to recover damages according to this rule; that is to say, they were entitled to and allowed to recover damages for the land taken and damaged by the construction of the sewer. The damages allowed in such cases are those which result from a proper construction of a sewer. According to the allegations of the complaint, after the sewer was constructed it was maintained in such a way as to constitute a nuisance. The right to construct sewers and drains implies no right to create a nuisance, public or private. It is the duty of the commissioners of the sewer district to construct the sewer so that it will not become a nuisance to any neighborhood or to any particular inhabitant thereof, and it is the duty of the city, after the sewer has been turned over to it, to avoid the same result

by properly maintaining and repairing the sewer after it is constructed. In *Joyce on Nuisances* (par., 284, p. 373), is said:

Where the municipal, quasi municipal, and public bodies generally proceed to exercise or do exercise their powers in constructing and maintaining great public works of a sanitary nature, such as a sewerage system, and the question of the extent of or limitations upon their powers has come before the courts, these powers, and the rights of the public and of private individuals in connection therewith, have occasioned much discussion. But, notwithstanding certain decisions not in harmony herewith, it may be stated that even though a municipality or other body has power to construct and maintain a system of sewers, and although the work is one of great public benefit and necessity, nevertheless such public body is not justified in exercising its powers in such a manner as to create, by a disposal of its sewage, a private nuisance, without making compensation for the injury inflicted, or being responsible in damages therefor, or liable to equitable restraint in a proper case, nor can these public bodies exercise their powers in such a manner as to create a public nuisance, for the grant presumes a lawful exercise of the powers conferred, and the authority to create a nuisance will not be inferred.

See also 2 Dillon, *Municipal Corporations* (4th ed., par. 1047).

The right conferred upon the sewer commissioners to construct the sewer system and to obtain an outlet therefor outside the city limits carried with it the power to condemn lands necessary for the outlet and for the construction of the septic tank and filter beds. In the suit brought in the circuit court the plaintiffs recovered damages for all injuries to their property as were the natural and necessary result of the construction of the sewer system. While it was lawful to construct the sewer system, and the plaintiffs have received compensation for the injury to their property incident to the construction thereof, it by no means follows that either the city authorities or the sewer commissioners have the right to act in excess of the powers conferred upon them by law. In short, it was the duty of the sewer commissioners to use due care in the construction of the sewer system, and the same duty devolved upon the city authorities in the operation and maintenance thereof.

The record shows that it was practicable at a reasonable cost, as part of the construction of the sewer system, to chemically treat the sewage in the septic tank so that the solid matter was reduced to a liquid form and the noxious and harmful odors would to a great extent be eliminated. It was the duty of the sewer commissioners to adopt such a method in the construction of the sewer system, and it was likewise the duty of the city authorities to use such a method in the maintenance of the system.

This brings us to the question of whether the sewer system was operated and maintained in such a manner as to constitute a nuisance.

The record in this case is long. Numerous witnesses were called to testify, and their evidence to a considerable extent is conflicting.

The evidence on the part of the defendants tends to show that the sewer and the septic tank were constructed in a proper manner and that there was no serious pollution of the air and no deposit of fecal matter or other solid substance on the lands of the plaintiffs or on other lands adjacent to the septic tank.

On the other hand, the testimony on the part of the plaintiffs establishes the fact that when septic tanks, filtering beds, and other devices for purifying sewage are constructed, operated, and maintained in a proper manner the solid matter which goes into the septic tank is reduced to a liquid form, and that the flow from the septic tank is practically odorless, and that no noxious odors of any serious consequence emanate from the septic tank; that the contents of the septic tank are chemically treated in such a way that the liquid which flows therefrom contains but little impure matter.

Several witnesses, including physicians and other experts, testified that they had been on the land adjacent to the septic tank and on the land of the plaintiffs, and that fecal matter and other solid substances were allowed to flow from the tank along with impure water, and that they were precipitated upon the lands of the plaintiffs. They testified as to the volume of such solid substances as were allowed to flow from the tank and to the intensity of the odors therefrom.

No useful purpose could be served by stating this testimony in detail. It is sufficient to say in a general way that the testimony showed that the odor came from the decaying and putrefying organic matter contained in the septic tank, and that these offensive odors were an indication of weak septic action and lack of purification. Some of the water which flowed from the tank was chemically treated and found to contain colon bacilli and to produce 75 per cent gas. The evidence of the experts shows that this could have been avoided by a proper operation and maintenance of the sewer system.

After a careful consideration of the whole record, we are of the opinion that the clear preponderance of the evidence shows that the sewer system was operated and maintained in such a way as to constitute a nuisance. Our statute authorizing cities and towns to form improvement districts for the construction of a system of sewers did not intend to authorize the creation of a nuisance.

The defendants pleaded the statute of limitations. The sewer system was created and put in operation in April, 1910, and the sewage has been continuously discharged on the lands of the plaintiffs for a period of three years thereafter. We do not agree with the contention of the defendants, however, that the action is barred by the statute of limitations. The mere fact that sewers are of permanent construction does not render the nuisance, if any, permanent also. As we have already seen, the nuisance in the present case arose from faulty operation and maintenance of the sewer. It was therefore of a continuing or recurring nature, and the action of plaintiffs was not barred.

The action of the defendants in negligently maintaining the sewer approximately and efficiently contributed to the nuisance. Thus the fundamental basis of all equity jurisdiction in tort manifests itself, and the right of the plaintiffs to equitable relief is clear and indisputable. *Pomeroy's Equity Jurisprudence* (vol. 5, sec. 514). See also *Durfey v. Thalheimer* (85 Ark., 544; 109 S. W., 519); *Joyce on Nuisances* (sec. 284, p. 373).

As we have already seen, this court has uniformly held that neither municipal corporations nor local improvement districts nor their officers may be sued at law for tort, but it does not follow that in a proper case they may not be enjoined from creating a nuisance or be required to abate one already created by them. Indeed, this affords ground for equitable relief in actions like this. The object of the organization of a sewer district and the authority of its board of commissioners is limited to the construction of the sewer and paying for same. When completed, they become subject to the control of the city. *Pine Bluff Water Co. v. Sewer District* (56 Ark., 205; 19 S. W., 576); *City of El Dorado v. Scruggs*, supra.

There is some conflict in the testimony as to whether or not the construction of the sewer has been completed. The record shows that the sewer has been in operation several years and that owing to faulty construction its operation has created a nuisance. This defect the commissioners have tried to remedy, but they have not yet succeeded. It does not definitely appear from the record whether or not the sewer has been turned over to the city authorities. It does show that the plaintiffs dismissed their cause of action against the city authorities. This they should not have done and, inasmuch as the decree must be reversed for the causes above stated, they will be permitted to amend their complaint, if they are advised so to do, to again make the city a party to the action; and the chancellor will be directed to enjoin the city authorities or sewer commissioners, whichever now have control of the operation and maintenance of the sewer system, from operating and maintaining it so as to create or continue a nuisance on the lands of the plaintiffs.